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No. 93-1457

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PHYLLIS G. DALESKE, ARTHUR E. ESCHENBACH, MARIE L. ESCHENBACH, ROBERT E. FIEDLER, SHIRLEY M. FIEDLER, CHARLES B. WEST, DORIS J. WEST, D.A. WHITE & CO., INC., and JOAN L. WHITE d/b/a/ D.A. WHITE ENTERPRISES, individually and as representatives of a class of all those owning interests in residential lots, townhouses or condominiums located in the "Pagosa Development", which were sold by Fairfield after March 1, 1983,

Petitioners,

v.

FAIRFIELD COMMUNITIES, INC. and COLORADO LAND TITLE COMPANY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Cirucit

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BRIEF OF RESPONDENT FAIRFIELD COMMUNITIES, INC. IN OPPOSITION

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QUESTION PRESENTED

Did the United States Court of Appeals for the Tenth Circuit err in holding that the district court did not use an incorrect legal standard and did not abuse its discretion in denying attorneys' fees to Petitioners in connection with a remand of the case?

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BRIEF OF RESPONDENT FAIRFIELD COMMUNITIES, INC. IN OPPOSITION

STATEMENT OF THE CASE

On February 28, 1994, the United States Court of Appeals for the Tenth Circuit (the "Tenth Circuit") affirmed a decision of the United States District Court for the District of Colorado (the "District Court") denying Petitioners' request for attorneys' fees under 28 U.S.C. § 1447(c). The only issue raised in the Petition

for Writ of Certiorari is whether the Tenth Circuit used an inappropriate standard in upholding the District Court's decision.

Petitioners are purportedly property owners at a resort owned by Respondent Fairfield Communities, Inc. ("Fairfield") in Pagosa Springs, Colorado. More than ten years ago, on August 2, 1983, Fairfield recorded a Supplemental Declaration of Restrictions (the "Declaration") with the County Recorder of Archuleta County, Colorado. The Declaration authorized Fairfield to collect a fee from the property owners to help pay for the resort's recreational amenities, such as golf courses, tennis courts and related facilities, and Fairfield has been collecting these fees since 1983.

On October 3, 1990, Fairfield filed a voluntary petition for Chapter 11 bankruptcy relief with the United States Bankruptcy Court for the Eastern District of Arkansas, Western Division. On August 14, 1992, the bankruptcy court entered an order confirming Fairfield's plan of reorganization, which provided that all assets of Fairfield revested in reorganized Fairfield free and clear of all claims, liens, charges or other encumbrances and that all claims, debts, rights, liabilities and causes of action based on any act, omission, transaction or other activity of any kind that occurred prior to the entry of the confirmation order were discharged on the plan's effective date. In addition, the order provided that the bankruptcy court retained broad jurisdiction after the plan's effective date to issue injunctions and other orders to restrain interference with the consummation, implementation or enforcement of the plan.

Ten years after the Declaration was recorded, on July 21, 1993, Petitioners filed a complaint against Fairfield and Colorado Land Title Company in the State District Court of Archuleta County, Colorado. The complaint seeks to invalidate the Declaration and Fairfield's right to collect the recreational amenities fees, and also asserts various other claims, including a request for refunds of certain fees previously paid by Petitioners, an injunction to prohibit Fairfield from collecting outstanding fees, damages and punitive damages.

Fairfield believes that Petitioners' claims arise in or relate to Fairfield's chapter 11 case and, as a result, the Arkansas bankruptcy court has jurisdiction to hear the case under 28 U.S.C. § 1334.[1] Accordingly, Fairfield removed this case to the District Court and intended to request the court to transfer the case to the bankruptcy court. Petitioners responded by moving to remand the case back to state court and requested attorneys' fees in connection with the remand under 28 U.S.C. § 1447(c), which provides that "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." Although the District Court granted the motion and remanded the case, it expressly found that "[t]here was a good faith basis for the removal" and that "[t]here was a fair basis for the position taken by counsel."[2] Accordingly, the District Court denied Petitioners' request for attorneys' fees under 28 U.S.C. § 1447(c).

Petitioners appealed the District Court's denial of their request for attorneys' fees to the Tenth Circuit. The Tenth Circuit found that there was "no legal error in the standard employed by the [D]istrict [C]ourt" and that the District Court did not abuse its discretion in declining to award fees because Fairfield "had a

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[1] It is Fairfield's position that Petitioners' claims arise in or relate to Fairfield's bankruptcy case because, among other reasons, Petitioners seek to (a) abrogate Fairfield's right to collect amenities fees, which right revested in Fairfield free and clear of all claims, charges or other encumbrances upon confirmation of Farifield's plan of reorganization, (b) recover damages, including punitive damages, based on actions that have been taken by Fairfield since 1983, more than seven years before its chapter 11 case was commenced, (c) remove a cloud on Petitioners' title to property that was allegedly imposed in 1983, and (d) rely on an admittedly discharged claim that Fairfield breached certain discharged pre-bankruptcy development obligations.

[2] The District Court made its ruling at a hearing held on September 16, 1983. A transcript of the ruling is attached at pages A-13 through A-15 of the Appendix ("App.") to the Petition for Writ of Certiorari.

legitimate basis" for the removal. The Tenth Circuit opinion is attached at pages A-1 through A-8 of the Appendix.[3]

ARGUMENT

Petitioners incorrectly contend that the legal standard employed by the Tenth Circuit in determining whether to award attorneys' fees under Section 1447(c) is in conflict with decisions of other circuit courts of appeal. The Tenth Circuit's decision, however, uses virtually the same language as, and is completely consistent with, the decisions of other circuit courts with respect to Section 1447(c) attorneys' fee awards.

Petitioners also incorrectly contend that this case presents an important question of federal law which has not been, but should be, settled by this Court. To the contrary, the Tenth Circuit's decision, like those of the Second, Fifth, Sixth and Ninth Circuits, merely ruled that the deletion of the word "improvidently" from Section 1447(c)[4] negated any requirement that a removal must be in bad faith for fees to be awarded. The Tenth Circuit's ruling does not raise an important issue of federal law that requires resolution by this Court. The Petition for Writ of Certiorari should be denied.

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[3] The state district court has since stayed the case to allow the bankruptcy court an opportunity to rule on Fairfield's request for a determination that Petitioners' claims were discharged in bankruptcy and that this case should be permanently enjoined.

[4] Prior to 1988, Section 1447(c) provided that if a case was removed "improvidently", the court could order the payment of costs in connection with remanding the case to state court. The 1988 revision to Section 1447(c) deleted "improvidently" and also authorized a court to award attorneys' fees in addition to costs.

A. The Tenth Circuit Decision In This Case Is Not In Conflict With A Decision Of Another United States Court Of Appeals.

The Tenth Circuit decision is not in conflict with any other circuit court decisions. To the contrary, the Tenth Circuit's ruling upholding the District Court's decision is entirely consistent with other circuit court decisions. The Tenth Circuit properly viewed the District Court's decision as having focused on the "propriety" of the removal, and expressly relied on and cited a Fifth Circuit Court of Appeals decision which held that "the propriety of the defendants' removal continues to be central to determining whether to impose fees". App. at A-8, *quoting Miranti v. Lee*, 3 F.3d 925, 928 (5th Cir. 1993).[5] Even Petitioners admit that the Fifth Circuit decision in not in conflict with the Tenth Circuit's decision. Petition at 20.

Moreover, the Tenth Circuit's decision is not in conflict with decisions of the Second, Sixth and Ninth Circuits as suggested by Petitioners. In *Morgan Guaranty Trust Co. of New York v. Republic of Palau*, 971 F.2d 917 (2d Cir. 1992), the Second Circuit affirmed a district court's conclusion that Section 1447(c) "requires application of a test of overall fairness given the nature of the case, the circumstances of the remand, and the effect on the parties." *Id.* at 924. Similarly, in *Morris v. Bridgestone/ Firestone, Inc.*, 985 F.2d 238 (6th Cir. 1993), the Sixth Circuit expressly agreed with the Second Circuit, emphasizing a district court's broad discretion in awarding fees and concluding that the award at issue was "fair and equitable." *Id.* at 240. Finally, in *Moore v. Permanente Medical Group, Inc.*, 981 F.2d 443 (9th Cir. 1992), the Ninth Circuit also focused on the district court's broad grant of discretion and, like the Fifth Circuit in *Miranti*, quoted the commentary on the 1988 revision to Section 1447(c)

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[5] The Fifth Circuit's "propriety" standard was in turn based on a direct quotation from the Commentary on 1988 Revision by David Siegel following 28 U.S.C.A. § 1447 (West Supp. 1993). *Miranti*, 3 F.3d at 928.

to support the conclusion that fees should be awarded when the removal is found to be "improper." *Id.* at 446.

In sum, in determining whether to award fees under Section 1447(c), the Second and Sixth Circuit decisions described the applicable standard in terms of "fairness" and the Fifth and Ninth Circuit used the term "propriety." The Tenth Circuit in this case utilized the similar words of "fair" and "legitimate" as well as referring to the "propriety" of the removal. Accordingly, the Tenth Circuit's decision is actually consistent, and not in conflict, with the other circuit court decisions on this issue.

B. The Tenth Circuit Has Not Decided An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

The Tenth Circuit reached two conclusions in this case: (1) that there was "no legal error in the standard employed" by the District Court and (2) that the District Court "did not abuse its discretion in declining to award fees and costs." App. at A-8. With respect to the applicable standard, the Tenth Circuit ruled that the deletion of the word "improvidently" in the 1988 revision to Section 1447(c) negated any requirement that a removal be in bad faith before fees could be awarded. App. at A-7. The Tenth Circuit's ruling in this respect is exactly the same as the rulings of the Second, Fifth, Sixth and Ninth Circuits. *Morgan Guaranty Trust*, 971 F.2d at 923; *Miranti*, 3 F.3d at 929; *Morris*, 985 F.2d at 240; *Moore*, 981 F.2d at 446.

In a misguided effort to demonstrate that the Tenth Circuit decided an important question of federal law, Petitioners argue that the Tenth Circuit incorrectly applied a "frivolousness" standard notwithstanding the 1988 amendment to Section 1447(c). The Tenth Circuit made no such ruling.

First, contrary to Petitioners' assertion, the Tenth Circuit did not use a "frivolousness" standard. In fact, the word "frivolous" never appears in either lower court decision. The District Court used the words "good faith" and "fair basis" and the Tenth Circuit used the words "legitimate basis" to describe the removal. App.

at A-14, A-8. Second, assuming, *arguendo*, that a "frivolousness" standard had been employed by the Tenth Circuit, the decision would not raise an important question of federal law requiring resolution by this Court. Indeed, this Court addressed this same question in another context just last month when it held that, under a similar statute authorizing a court to use its discretion in awarding fees, 17 U.S.C. § 505, factors *specifically including "frivolousness"* may be used to guide the court's discretion. *Fogerty v. Fantasy, Inc.*, 62 U.S.L.W. 4153, 4158, n.19 (U.S. March 1, 1993). By ruling merely that the standard employed by the District Court was not legally erroneous, the Tenth Circuit did not decide an important question of federal law which has not been, but should be, settled by this Court.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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